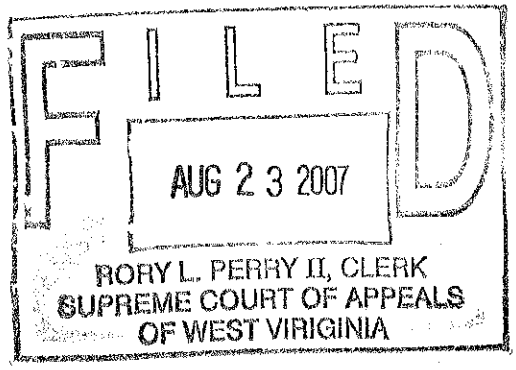
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAR AWAY FARM, LLC
Petitioners,

v.

Supreme Court Docket No. 33438



JEFFERSON COUNTY
BOARD OF ZONING APPEALS,
TIFFANY HINE, Chair
THOMAS TRUMBLE, member
JEFF BRESEE, member
Respondent.

FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

JEFFERSON COUNTY BOARD OF ZONING APPEALS' RESPONSE TO BREIF ON APPEAL

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JEFFERSON COUNTY BOARD OF ZONING APPEALS' RESPONSE TO BRIEF ON APPEAL

Come now your respondents, the Jefferson County Board of Zoning Appeals (hereinafter "BZA") and hereby files this response to the Appellant's Brief on Appeal filed with this Court which seeks: (1) a reversal of the decision of the Jefferson County Circuit Court entered September 18, 2006, which upheld the BZA's denial of a conditional use permit (hereinafter "CUP"); (2) an Order directing the BZA to issue the Far Away Farm CUP. In support of this response the respondent submits the following:

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I. Summary of the Argument

The appellant essentially argues that because a conditional use permit (hereinafter "CUP") receives a favorable LESA score, it should be approved by the BZA. Further, the arguments of the appellant render useless all of the other standards governing the issuance of a CUP, especially the compatibility standard. However, the Jefferson County Zoning Ordinance ("the Ordinance") contains three criteria that must be applied by the Board of Zoning Appeals ("BZA") when considering whether to grant a CUP to an applicant and an applicant must meet all three before a CUP is issued. Those three criteria are: (1) a successful LESA score; (2) the Board of Zoning Appeals' resolution of unresolved issues; and (3) findings by the Board that the use proposed by the applicant is compatible with the surrounding neighborhood. Ordinance § 7.6 (g). An applicant must meet all three of these criteria before the BZA can grant a CUP. Further, the Ordinance does not require the BZA to give greater deference to any one of the three standards enumerated in the Ordinance. If an applicant fails to meet any one of the standards, then the CUP will and must be denied. Thus, a successful LESA score is only the first of three criteria and an applicant's CUP application will not automatically be approved just because a successful LESA score was awarded to it. An applicant must continue through the CUP process and satisfy the other two criteria.

In deciding whether the proposed project submitted by Far Away Farm was compatible, the BZA applied the plain meaning of *compatible* as it is defined in any standard dictionary. In addition, the amended Ordinance offers some guidance as to the meaning of compatible with regard to those criteria that the public is permitted to raise at the Compatibility Assessment meeting. Because the BZA found that the neighborhood was ***not*** compatible, it denied the Far Away Farm's CUP. Therefore, although Far Away Farm received a favorable LESA score in the

first prong of the three-prong test, it failed to meet the other two prongs of the standard in the Zoning Ordinance, which failure merited denial of the CUP.

II. Statement of the Facts

In June of 2004 Far Away Farm, which is located in the rural district of Jefferson County, applied for a Conditional Use Permit. After filing the application, the director of the Department of Planning, Zoning, and Engineering ("DPZE") conducted a LESA evaluation of the property, and the application was granted a passing score. This score was appealed to the Board of Zoning Appeals by community members. Upon review of the LESA score the Board agreed in part with the appellant, and slightly modified the score, however, the modified Far Away Farm LESA score was still a passing score. Because of this successful LESA score, Far Away Farm was permitted to continue through to the second and third stages of the CUP process. Accordingly, a compatibility assessment meeting was held, permitting members of the public to hear the developer's proposal and raise compatibility concerns about the proposed project. Of the 106 issues that were raised, the developer agreed to modify his plans or actions to satisfy thirty-nine of the conditions that were raised by the public. Because sixty-seven unresolved issues remained, a public hearing was held before the BZA to address those concerns that remained unresolved. Although there were sixty seven unresolved issues, several of them related and could be grouped together in larger categories. For example, of those sixty-seven issues, twenty-six were concerns about either adequate roads or excess density of the proposed project. Thirty-six of the unresolved issues related to concerns about construction and five were concerns about maintaining the historical significance of the property.

At the public hearing, several members of the public spoke about their experiences with the roads in the neighborhood, the rural and agricultural nature of the surrounding properties, and

the historical significance of the Far Away Farm property. The Developer also presented evidence and expert reports concerning some of the unresolved issues, including an aerial photograph of the property in question. Further, both the public and the developer submitted evidence concerning the density of the properties surrounding the Far Away Farm proposed development. Mr. Dunleavy, a member of the public, represented to the BZA that the current average density surrounding the Far Away Farm project was 14.56 acres per lot. When Far Away Farm contested this calculation, several BZA members questioned its representatives as to what they felt the average density of the surrounding property was. Far Away Farm did not provide a direct answer to that question at the BZA meeting. However in its "Verified Petition for Certiorari," Far Away Farm submitted that the average density of the surrounding property was 9.11 acres per parcel.

The BZA allotted Far Away Farm 30 minutes to make its presentation, in accordance with the procedures outlined in Section 7.7(b) of the Ordinance. The developer was also granted an additional fifteen minutes for rebuttal. Any group recognized by the chair was permitted fifteen minutes to address the board, and members of the public were permitted five minutes each to address the BZA. Because the BZA wished to give each category of presenters the full amount of time provided by the Ordinance, any time in which the BZA was questioning or the person offering comment was responding to those questions was not considered in the total amount of time granted to the presenter. Therefore, the secretary for the BZA stopped the clock when a BZA member addressed a presenter or when that presenter was responding to a question posed by a BZA member. Because of the limited amount of time the Ordinance permits a developer to present evidence, the developer is given the opportunity to present unlimited written submissions to the BZA in addition to the oral testimony and presentation provided at the Public

Hearing. Far Away Farm took advantage of this protection offered by the Board and submitted memoranda and documents that totaled 320 pages.

In August 2005, the BZA held a special meeting to take action on Far Away Farm's CUP application. The BZA concluded that the development as proposed was too dense to be compatible with the surrounding neighborhood, which was comprised of several lots consisting of 14.56 acres on average. In addition, the BZA suggested that a density lower than that proposed by the development may be more compatible with the neighborhood. Finally, the physical conditions of the roads contributed to the BZA's conclusion that the proposed project would not be compatible with the neighborhood. The BZA voted to deny Far Away Farm's CUP application.

After denying the CUP application, the BZA issued Findings of Fact dealing with those issues that were relevant to the denial of the CUP. The other unresolved issues dealt with concerns that were only relevant if the project was granted a CUP and construction commenced on the property. The BZA denied Far Away Farm's CUP based upon those factors delineated in the Ordinance. Because the project as proposed was not compatible with the surrounding neighborhood, the project failed to meet all of the conditions, specifically prongs two and three of the CUP process regarding resolution of unresolved issues and compatibility with neighboring development, which are required for approval.

III. Points and Authorities Relied Upon

Caselaw

Chongris v. Board of Appeals of the Town of Andover, 811 F.2d 36, 41 (1st Cir. 1987).
Corliss v. Jefferson County Board of Zoning Appeals, 214 W.Va. 535, 591 S.E.2d 93 (2003)
Frye v. Kanawha Stone Company, Inc., 202 W.Va. 467, 505 S.E.2d 206 (1998)
Henry v. Jefferson County Planning Commission, 215 F.3d 1318 (2000)
Henry v. Jefferson County Planning Commission, 148 F. Supp.2d 698, 711 *aff'd in part, vacated in part* 34 Fed. Appx. 92 (4th Cir. W.Va.2002), *cert. denied,* (U.S. Mar. 31, 2003)
Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals, 218 W.Va. 436, 624 S.E.2d 873 (2005)
Kaufman v. Planning and Zoning Commission of the City of Farimont, 171 W.Va. 174, 298 S.E.2d 148 (1982)
Landmark Land Company of Oklahoma, Inc v. Buchanan, 874 F.2d 717 (10th Cir. 1989)
Proudfoot v. Proudfoot, 214 W.Va. 841, 591 S.E.2d 767 (2003)
State v. Browning, 199 W.Va. 417, 485 S.E.2d 1(1997)
State v. Lily, 194 W.Va. 595, 461 S.E.2d 101
State Deputy Sheriff's Association v. County Commission of Lewis County,180 W.Va. 420, 422, 376 S.E.2d 626, 628
Weimer v. Hinkle, 180 W.Va. 660, 379 S.E.2d 383 (1989)
Williams v. City of Columbia, 906 F.2d 994 (4th Cir. S.C. 1990)
Wolfe v. Forbes, 159 W.Va. 34, 217 S.E.2d 899.

Statutes

West Virginia Code § 8A-8-9(3)

Ordinance

Jefferson County Zoning and Land Development Ordinance § 5.7(d)(1)
Jefferson County Zoning and Land Development Ordinance § 6.2
Jefferson County Zoning and Land Development Ordinance § 7.6 (a)
Jefferson County Zoning and Land Development Ordinance § 7.6 (b)
Jefferson County Zoning and Land Development Ordinance § 7.6 (f)
Jefferson County Zoning and Land Development Ordinance § 7.6 (g)
Jefferson County Zoning and Land Development Ordinance § 7.7 (b)

IV. Standard of Review

"While on appeal there is a presumption that a board of zoning appeals acted correctly, a reviewing court should reverse the administrative decision where the board has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction." *Syl. Pt. 5*, Wolfe v. Forbes, 159 W.Va. 34, 217 S.E.2d 899. "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." *Syl. Pt. 3*, Corliss v. Jefferson County Board of Zoning Appeals, 214 W.Va. 535, 591 S.E.2d 93

V. Memorandum of Law

A. The BZA Applied the Ordinance Correctly and Far Away Farm Has Waived the Argument that the BZA Applied It Incorrectly

The decision to grandfather certain projects pertained only to the requisite LESA score and not those other amendments approved on March 23, 2005. Further, Far Away Farm has waived the BZA's application of the April 8 2005 amendments because it failed to raise the issue before either the BZA or the circuit court. Far Away Farm was represented by counsel at all times during the application process. In addition, Far Away Farm's counsel was also actively involved in the amendment process and has both constructive and actual knowledge of the amendments as they were approved by the County Commission. Therefore the BZA correctly applied the amendments to the Far Away Farm CUP and the petitioner has waived any objection to their application because they failed to raise an objection below.

This Honorable Court will not consider an error properly preserved in the record nor apparent on the face of the record. State v. Browning, 199 W.Va. 417, 485 S.E.2d 1 (1997). The Court explained the raise or waive rule in Weimer v. Hinkle, 180 W.Va. 660, 663, 379 S.E.2d

383, 386 (1989), as part of a design "to prevent a party from obtaining an unfair advantage by failing to give the trial court an opportunity to rule on the objection and thereby correct the potential error." This Court has concluded that "issues not raised on appeal or merely mentioned in passing are deemed waived." State v. Lilly, 194 W.Va. 595, 605, 461 S.E.2d 101, 111. In Lily, the Court concluded that "casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal." *Id.* at 605.

Paul Raco, the then-zoning administrator, cited the language of the new amendments at the beginning of the Far Away Farm Hearing on July 26, 2005. Mr. Raco referred to the ***new*** 2005 amendments of April 8 twice in his opening remarks to the BZA. *See* July 26 BZA Tr. 30:7 and 30: 15. Immediately after Mr. Raco referred to the new amendments, Mr. Gay spoke and raised objections to the preliminary matters that were being discussed between Mr. Raco and the BZA. However, he remained silent on the BZA's intent to apply the 2005 amendments to the Far Away Farm project. *See* July 26 BZA Tr. 31:18-36:38. Therefore, it is clear that Far Away Farm counsel knew that the 2005 amendments would be applied to the Far Away Farm CUP but failed to object to the BZA's application of the amendments to the project before both the BZA and the Circuit Court.

Far Away Farm asserts in its Brief on appeal that the issue of which Ordinance should have been applied to its CUP is an issue of subject matter jurisdiction and can be raised at any time. However, it is clear that Far Away Farm does not contest that the BZA had jurisdiction to hear and decide CUPs. "The BZA erred because it should have applied the Jefferson County Zoning Ordinance as it existed before it was amended effective April 8, 2005." *See* Page 26 Brief on Appeal. According to this statement the only issue is whether the BZA applied the correct Ordinance to the CUP not that they were without jurisdiction to hear and decide CUPs.

Therefore, even Far Away Farm does not contest that the BZA has jurisdiction to hear and decide CUPs and the application of the wrong version of the Ordinance is at most an erroneous principle of law. In no instance is the BZA's subject matter jurisdiction over the CUP process called into question. Because the application of the amendments is not an issue of subject matter jurisdiction, Far Away Farm should have raised the issue at the BZA or on appeal to the circuit court. Since it did neither, the issue of whether the new amendments are applicable to the Far Away Farm CUP is accordingly waived.

1) The County Commission Only Grandfathered LESA Scores

The record of the March 23, 2005 County Commission meeting reveals that the County Commission only grandfathered in the applicable LESA score a project had to obtain to proceed through the Development Review System. Despite the grandfathering of the LESA requirements, the County Commission intended for each project to be heard under the new Ordinance procedures as they were amended on April 8, 2005. Mr. Raco, the then Zoning Administrator and Executive Director of the Department of Planning, Zoning, and Engineering presented the proposed amendments to the County Commission at their regularly scheduled meeting on March 23, 2005. At that meeting Mr. Raco made several recommendations to the Commission concerning how applications should be handled once the Commission adopted the new amendments. Mr. Raco recommended that the Commission grandfather the LESA application and not grandfather any process contained in the amendments. Mr. Raco went on to explain to the Commission that it should grandfather in the scoring system because it changed the score needed to advance a project to the Compatibility Assessment phase from 55 to 60. Before the amendments were enacted an application needed a score 55 or less to advance to the compatibility phase. The proposed amendments changed that requirement to a score of 60 or

less. Therefore, Mr. Raco recommended for administrative purposes that the County Commission grandfather the old LESA score of 55 for all applications received before April 8, 2005. *See* CD Recording of March 23, 2005 meeting CD 2 Track # 4[1]. Accordingly, the County Commission adopted Mr. Raco's recommendation in the form of the motion cited by the appellant's in their brief on appeal. Thus, the only portion of the Zoning Ordinance for which applications were grandfathered was the LESA score.

Further, Mr. Raco, who recommended that the LESA applications be grandfathered was also the staff member responsible for informing the BZA of which ordinance applied. At the July 26, 2005 hearing on Far Away Farm, Mr. Raco cited the new amendments to the BZA as the standard that body must use in reaching its decision. "The one thing that was added into your ordinance in this past change on April 8th, it did not necessarily define the world 'compatible,' but it defined the word 'neighborhood' to a one-mile radius." Mr. Raco July 26 2005 Tr. 30:5-9. In addition, the BZA's counsel at the time also advised the BZA as to which standard it should apply to the Far Away Farm CUP.

> MR. JONES: 7.6(g) basically states the standard that—it sets forth the standard. It says, "The standard for governing the issuance of a conditional use permit shall be a successful LESA plan application, Board of Zoning Appeals' resolution of unresolved issues, and evidence offered by testimony and findings by the Board of Zoning Appeals, if proposed development is compatible with the neighborhood where it is proposed."
>
> *July 26, 2005 BZA Transcript 27:15-21—28:1-5*

Therefore, both of the BZA staff members, counsel and Mr. Raco who advised both the BZA and the County Commission indicated that the new amendments should be applied to the Far Away Farm CUP.

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[1] The BZA will be submitting a Motion to Supplement the Record with the County Commission records of the Ordinance Amendment Process.

2) Far Away Farm's Counsel Had Knowledge of the County Commission's March 23, 2005 Motion to Grandfather the LESA Score

Even if the Court finds that the Commission intended that all projects received before April 8, 2005 did not have to comply with the new amendments, Far Away Farm's counsel had knowledge of the County Commission decision and should have raised the issue both before the BZA and the Circuit Court. All of Far Away Farm's counsel actively participated in the Zoning Ordinance amendment process, and were all present throughout the public hearings conducted on the zoning amendments. According to the County Commission sign-in sheets, Far Away Farm counsel Peter Chakmakian was present at the March 3, 2005 meeting on the proposed amendments to the Jefferson County Zoning Ordinance. *See Sign-in Sheet.* In fact, Mr. Chakmakian made a presentation on zoning at that meeting. *See presentation of Peter Chakmakian.* Further, Mr. Chakmakian was present at the March 23, 2005 meeting in which the County Commission adopted the new amendments and decided how those amendments would apply to pending applications and which applications would be grandfathered. *See County Commission minutes of March 23, 2005.* Mr. Chakmakian made an additional presentation on zoning to the County Commission at this meeting as well. *See presentation of Peter Chakmakian*[2]. Thus, Far Away Farm's counsel was present during the entire amendment process. Further, they actively participated in each of the meetings, making suggestions to the County Commission as to how the Ordinance should be amended. Therefore, because of their active participation and their presence at both the public hearings and the March 23, 2005 County Commission meeting, the Petitioner's counsel, at the very least, should be held to have constructive knowledge of the County Commission's decisions with regard to the April 8, 2005 amendments.

[2] The BZA will include in its Motion to Supplement the Record all of the documents referenced.

However, not only did Far Away Farm's counsel have constructive knowledge, they also had actual knowledge of the County Commission's March 23, 2005 motion on grandfathering. Far Away Farm's counsel assert that they did not learn of the County Commission's decision on the effective date of the new amendments until after they filed this appeal. However, Far Away Farm's counsel represent another petitioner in a case currently pending in the circuit court styled as *Jefferson County Citizens for Economic Preservation (JCCEP) v. Jefferson County Commission, et. al.*, Civil Action No. 05-C-143, which was filed with the Jefferson County Circuit Clerk on May 5, 2005. This civil action directly challenges the County Commission's adoption of the April 8, 2005 amendments. In that petition, Far Away's Farm's counsel who is also counsel for JCCEP, stated in paragraph 6 of their complaint, "On March 23rd, 2005, the County Commission voted to adopt the new amendments to the Ordinance, effective April 8, 2005." *See Writ of Certiorari.*[3] It's clear from this paragraph that Far Away Farm's counsel was aware of the County Commission actions of March 23rd in which that body decided that the amendments would have an effective date of April 8, 2005. Further, Far Away Farm's counsel filed this complaint on behalf of JCCEP ***two months*** before the BZA's Far Away Farm hearing and ***seventeen months before*** the Circuit Court entered the order, which is being appealed in the case, *sub judice*. Thus, Far Away Farm's counsel was aware of the effective date both at the BZA hearing and when they filed an appeal of the BZA's decision in circuit court. Based on this actual knowledge, Far Away Farm should have raised the issue before the BZA and circuit court. Because they failed to object in either forum, the issue is accordingly waived.

[3] The BZA will include in its Motion to Supplement the Record, an attested copy of this petition.

B. Far Away Farm Has Waived the Right to Appeal the Location of the One Mile Radius Relied Upon by the BZA.

The location of the one mile radius upon which the BZA relied to define the density of the surrounding neighborhood was not an issue on the record in the circuit court. "The appellate review of a ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not a part of that record." *Syl. pt.* 2 Proudfoot v. Proudfoot, 214 W.Va. 841, 591 S.E.2d 767 (2003) *quoting Syl. Pt. 2*, State v. Bosley, 159 W.Va. 67, 218 S.E.2d 894 (1975). Further, "[t]his court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." *Syl. Pt. 3* Proudfoot v. Proudfoot, 214 W.Va. 841, 591 S.E.2d 767 (2003) *quoting Syl. Pt. 2*, Sands v. Security Trust Company, 143 W.Va. 522, 102 S.E.2d 733 (1958), *Syl. Pt. 2,* Duquense Light Co. v. State Tax Dept., 174 W.Va. 506, 327 S.E.2d 683 (1984), *cert denied*, 471 U.S. 1029, 105 S. Ct. 2040 (1985).

In its petition for appeal, the Petitioner cites the BZA's reliance on an exhibit submitted by a community member, Mr. Dunleavy, as error. The Petitioners argue that because Mr. Dunleavy calculated the neighborhood surrounding the proposed Far Away Farm subdivision using a one mile radius from the perimeter of the southeast corner of the property, the BZA's reliance on these calculations created a new definition of neighborhood, constituting a de facto amendment to the Ordinance. Further, the petitioners accuse the BZA of attempting to reduce the average density of the surrounding neighborhood, arguing that the circle was drawn in this location in order to reduce the overall density of the property surrounding Far Away Farm. However, the location of the circle was not an issue raised by Far Away Farm in either its petition to the circuit court or its brief in support of the petition. Rather, Far Away Farm contested only the BZA's using density as a measure of compatibility. Thus, the circuit court never considered whether the BZA's reliance upon the density of the surrounding neighborhood

as defined by a one mile radius from the southeast corner of the Far Away Farms property was error. Accordingly, because this issue is not part of the Circuit Court's record and because the circuit court did not decide the issue in the first instance, it is an inappropriate issue for appellate review in this court.

Further even if the BZA's reliance on the neighborhood as defined from the southeast corner is error, Far Away Farm submitted in its petition for writ of certiorari to the circuit court what it considered to be a fair calculation of the average density of the surrounding neighborhood. The BZA, using Mr. Dunleavy's calculations, had found the average density of the neighborhood surrounding Far Away Farms to be 14.56 acres. However, Far Away Farm argues that this calculation is skewed because the one mile radius was drawn from the corner of the property farthest from the town of Shepherdstown. In its petition to the Circuit Court, Far Away Farm submitted the average density according to its own calculations. "A fair calculation would be to take the total acreage—2,577 plus 157 equaling 2,734, divided by the total number of dwelling units 176 plus equaling 300 to come up with a true average of 9.11 acres per lot." *Far Away Farm Verified Petition for Certiorari*, pg. 17. Thus, it appears that Far Away Farm has consented to a calculation of average density. Further, even if the BZA had used this calculation, the surrounding neighborhood is still much more dense than the proposed subdivision. Far Away Farm applied for 152 homes on 122 acres, an average density of 4/5 of an acre per lot if proposed open space is not considered. However, the density of the surrounding neighborhood is 9.11 acres per lot. Thus, the proposed subdivision is still much more dense than the surrounding area.

Finally, Mr. Dunleavy's calculations of density based upon density within a one mile radius of the southeast corner of the property was not the only exhibit the BZA relied upon to deny the Far Away Farm CUP. Far Away Farm attempts to inflate the importance the BZA

placed upon Mr. Dunleavy's calculations. However, a close examination of the BZA's findings of fact reveals that the BZA relied more heavily upon an aerial photograph submitted by Far Away Farm that exhibits the area surrounding the proposed subdivision. In its order denying the CUP, the BZA cites this submission as a major factor in its conclusion that the proposed subdivision was not compatible with the surrounding neighborhood.

> In support of this motion the Board concludes that Far Away Farms, LLC is not compatible with the surrounding neighborhood. In support of this conclusion the Board refers to two pieces of evidence. The first is an aerial photograph submitted by the developer showing the development of nearby areas with the development itself overlaid in black ink. The second item the Board references is a document entitled Exhibit 1 bearing a stamped receipt date of July 7, 2005. The aerial photograph shows pictorially that the density of the proposed development is far in excess of anything around it. When studied more clearly it shows that the actual lot size will be 1/5 to 1/3 of an acre. By dividing the acreage of the parcel by the number of dwelling units planned, density would still be around one home per 8/10 of an acre. This aerial photograph itself shows that the development is incompatible with the surrounding neighborhood.
>
> *BZA Order Denying Far Away Farm Conditional Use Permit Application*, pg. 2-3

Therefore, the BZA relied upon both the evidence submitted by Far Away Farm and Mr. Dunleavy to reach the determination that the proposed subdivision was not compatible with the surrounding neighborhood.

Far Away Farm did not provide the Circuit Court the opportunity to address the issue of the location in which the one mile radius was drawn. Accordingly, Far Away Farm has waived this issue on appeal and is prevented from raising the issue in this Court for the first time. Further, even if the Court were to determine the one mile radius of the southeast corner as an improper definition of neighborhood, even Far Away Farm's calculations prove that the proposed subdivision is much more dense than the surrounding neighborhood. Finally, the BZA considered not only the submissions of the public but also the submissions of the developer and used both documents to reach its findings on compatibility.

C. The BZA Possesses the Discretion to Weigh the Evidence Presented to It at the CUP Public Hearing

At the July 2005 public hearing, Far Away Farm presented expert reports and testimony regarding several of the unresolved issues, including a traffic study that examined the impact the Far Away Farm Subdivision would have upon traffic in the area. This report revealed that the traffic would not create significant impact on the four intersections included in the study. However, the public, who daily drive on the roads in question also presented evidence regarding the current traffic conditions based upon their daily experiences in the neighborhood. Although the traffic expert indicated that the new subdivision would not significantly impact the level of service at the four intersections, members of the public testified that narrow roads and numerous hills create blind spots along the adjacent roads. Further, members of the public commented about their personal observation of accidents and daily traffic conditions on the affected roads.

In addition, the property owners living in the area surrounding Far Away Farm provided testimony about the density of their own property and surrounding areas as compared to the proposed density of the Far Away Farm subdivision. Those property owners spoke at length about agricultural activities that are still performed on the surrounding properties, and expressed concern that a residential subdivision moving into the area would not be compatible with the surrounding rural farms.

Far Away Farm contends that the BZA improperly considered the public's comments and completely ignored the expert testimony and other evidence that was presented by the developer. Further, the petitioner argues that in giving consideration to evidence presented by those members of the public who have a chance to observe the traffic and neighborhood conditions on

a daily basis, the BZA violated the law as articulated in Kaufman v. Planning and Zoning Commission of the City of Farimont, 171 W.Va. 174, 298 S.E.2d 148 (1982).

However, the actions of the City of Fairmont's Planning Commission in Kaufman differ dramatically from the actions of the BZA. Kaufman involved a ***planning and zoning commission*** whose members relied upon their ***own*** experiences when voting on a ***planning*** issue rather than a matter that involved zoning. In Kaufman, the individual commissioners relied upon their own personal experiences and "utilized information obtained outside the hearings in making their decision." 171 W.Va. at 178, 298 S.E.2d at 152. Thus, the Planning Commission considered their own familiarity with traffic conditions on the roads in question rather relying upon testimony presented at the public hearing. The court found that "[t]he commission members' ***own*** experiences [were] not sufficient to overcome the evidence presented by [the developer]." 171 W.Va. at 183, 298 S.E.2d at 157. Further, in Kaufman, the developer's proposed use of the property complied with the City of Fairmont's Zoning Ordinance, and the court found that the City of Fairmont was "attempting to rezone property by denying approval a subdivision plat." *Id.*

The actions of the BZA regarding Far Away Farm provide a stark contrast to those found in Kaufman. There is no evidence to indicate that the BZA members ever considered their own experiences with the traffic and roads surrounding Far Away Farm. In addition, unlike the subdivision in Kaufman, the proposed use of the Far Away Farm property does not conform with the zoning requirements articulated in the Jefferson County Zoning Ordinance, and the developer is seeking a conditional use permit because the proposed density of the subdivision exceeds that maximum number of lots permitted in the rural district.

Further, the stricture contained in Syllabus Point 8 of Kaufman that, "when an applicant meets all requirements, plat approval is a ministerial act and a planning commission has no

discretion in approving the submitted application" applies only to a Planning Commission, not to a Board of Zoning Appeals. Rather, a Board of Zoning Appeals acts in a quasi-judicial capacity and possesses discretion to "hear and decide conditional uses of the zoning ordinance. . ." W.Va. Code § 8A-8-9(3). Thus, while a Planning Commission's actions in approving final plats is ministerial, the Board of Zoning Appeals has ***discretion*** as to whether or not to grant the conditional use based upon the three factors enumerated in the Zoning Ordinance. Therefore, a comparison between the City of Fairmont Planning Commission's decision to deny a final plat and the Jefferson County BZA's decision to deny a conditional use permit is not on point and places no mandatory duty upon the BZA.

Finally, the BZA is permitted to weigh all of the evidence presented and is not required to place more weight upon expert testimony than it does upon the testimony of those who live in an area and interact with and experience the conditions of the neighborhood on a daily basis. Thus, while a traffic expert may study the traffic patterns for a short time, those individuals living in the area have an opportunity to observe the traffic conditions and roads every day, and as such can offer a more realistic view than a traffic expert's theoretical analysis.

Further, this Court, in the context of juries, has ruled that an expert's opinion is not entitled to any more deference than that of a lay person. "The testimony of expert witnesses on an issue is not exclusive and does not necessarily destroy the force or credibility of other testimony. The jury has a right to weigh the testimony of all witnesses, experts and otherwise; and the same rule applies as to weight and credibility of such testimony." *Syl. Pt. 6,* Frye v. Kanawha Stone Company, Inc., 202 W.Va. 467, 505 S.E.2d 206 (1998) *quoting Syl. Pt. 2,* Webb v. Chesapeake & O. Ry. Co., 105 W.Va. 555, 144 S.E. 100 *cert. denied,* 278 U.S. 646, 49 S.Ct. 82 (1928). Although the BZA cannot completely disregard expert testimony, its presence does

not require that the lay testimony of those who are familiar with the road conditions and interact with them on a daily basis be completely ignored either. Thus, the BZA, after weighing the evidence presented by both the public and the studies presented by the experts, is entitled to place more weight upon the comments of the public who has the opportunity to study the conditions on a daily basis.

D. The BZA Correctly Applied the Three Standards Contained in the Zoning Ordinance

The Ordinance contains three factors which must be applied when considering whether to grant or deny a CUP. The BZA must consider: (1) a successful LESA score; (2) resolution of unresolved issues; and (3) the compatibility of the proposed development with the neighborhood. *Ordinance* 7.6(f). However, the Ordinance does not indicate that one factor should be weighed more heavily than any other factor, and a proposed application must meet all three of the standards before a CUP can be issued. The BZA examined all three of these criteria and found that the proposed subdivision did not comply with the third factor because the density was much higher than that of the existing neighborhood.

1) LESA is Only One of Three Factors that the BZA Must Consider When Deciding Whether to Issue a CUP

The Ordinance lists three factors that the BZA must consider when deciding upon a CUP. The three factors are a successful LESA Point Application, Board of Zoning Appeals resolution of unresolved issues, and evidence offered by testimony that the development in compatible with the surrounding neighborhood. *Ordinance* § 7.6(g). The Ordinance does not indicate that any one of three factors should be given more consideration than any of the other factors. However, the Petitioner seems to suggest that because Far Away Farm received a successful LESA score, it should be granted a CUP based solely upon that passing LESA score. This interpretation is not

consistent with the plain language contained in the Ordinance. The BZA must consider ***all three of the factors***, and an applicant ***must meet all three*** before it can be awarded a CUP. "The standards governing the issuance of a Conditional Use Permits shall be: successful LESA point ***application***; Board of Zoning Appeal's resolution of unresolved issues; and evidence offered by testimony and findings of fact by the Board of Zoning Appeals that the proposed development is compatible with the surrounding neighborhood." *Jefferson County Development Review Ordinance* §7.6(f) (emphasis added).

In fact, a close examination of the three factors will reveal that each factor is a stage in the CUP process. First, the LESA scoring system acts a threshold to determine if an application can even advance to the other stages in the CUP process. "A score of 60 points or less advances the application to the Compatibility Assessment Meeting stage"[4]. *Ordinance* § 6.2. Thus, the LESA score is a threshold for moving on to the next stage. If at any stage an application fails to meet one of the three factors, then the CUP should be denied. Thus, the successful LESA score serves ***only*** to advance the application to the next stage, and it is the first determination the BZA must make; a successful LESA score does not indicate that any development right has vested in an applicant. Moreover, a successful LESA score is in no way determinative of whether a project ultimately receives a CUP, and nothing indicates that successful compliance with this factor should be given any more consideration than the other two factors.

2) Several Unresolved Issues Became Moot when the CUP Was Denied

The BZA issued detailed Findings of Facts and Conclusions of Law with regard to those issues that were fundamental to its decision to deny the CUP. For instance, the BZA decided that

[4] Despite its name, the purpose of the Compatibility Assessment Meeting is not for the BZA to determine if the proposed development is compatible. Rather, the meeting is not held by the BZA itself, but instead by staff and is intended to permit the developer's presentation and proposal and to provide adjacent and confronting property owners and all other interested parties an opportunity to ask the developer questions on unresolved issues. *Ordinance* 7.6(a).

the proposed subdivision was too dense to be compatible with the surrounding area. Although the BZA did not address all 67 unresolved issues, nonetheless the BZA did comply with the requirements contained in §§ 7.6(f) and 7.6(g) of the Ordinance. The BZA resolved those issues that were relevant to the project receiving a CUP. Of the sixty-seven unresolved issues, only twenty-six were related to density or road issues. All other remaining issues related to concerns that became moot once the decision to deny the CUP on the density and road issue was made. Of the remaining forty-one unresolved issues, thirty-six of them were concerns about construction or design of the proposed development, and five of the issues were concerns about history. These construction, design, and history issues only became relevant if the proposed development were constructed. Thus, the BZA issued detailed Findings of Fact and Conclusions of Law related to those issues which were relevant to the denial of the CUP.

Similarly, it was not necessary for the BZA to address all of the sixty-seven issues at the public hearing. To do so, would have been a waste of the time for both the public and the BZA. As discussed, forty-one of the unresolved issues were only relevant if the CUP was approved and construction set to commence. The BZA addressed the density and roads issues and did not consider additional issues not presented in the Planning Commission Staff Report. Therefore, the BZA properly only considered the twenty-six unresolved issues presented which related to pre-construction issues, and did not act erroneously when it did not address the remaining forty-one construction issues presented to it by the staff.

3) The Development Was Not Compatible with the Surrounding Neighborhood

The Petitioner makes the circular argument that density cannot be considered as an element of compatibility because the purpose of the Development Review system is to permit increased density in the rural zone. Further, the Petitioner asserts that residential development is

always compatible with other residential development regardless of any discrepancy of density between the existing development and the proposed development. Thus, under the Petitioner's rationale, any proposed residential subdivision would ***always*** be compatible in the rural zone because residential housing is a principle permitted use in the rural zone. If the Ordinance is interpreted in this manner, the BZA should not be permitted to consider ***any*** compatibility issues because residential will always be considered compatible in any rural area that contains just one residential home, thereby making the third prong of the CUP standard of density a useless factor. Further, the BZA would be bound to approve any increase in density no matter how dense the subdivision would become, annihilating the rural zone.

The CUP process is intended to provide a developer an opportunity to seek permission to increase the density beyond that which is normally allowed in the rural zone. Jefferson Utilities, Inc. v. Jefferson County Board of Zoning Appeals, 218 W.Va. 436, 624 S.E.2d 873 (2005). However, currently in a rural zone, a subdivider may only subdivide one lot per fifteen acres. *Ordinance* § 5.7(d)(1). Thus, an increase in density could possibly be defined as one lot per fourteen acres. Any grant of a CUP for more subdivision of land than is permitted in the Ordinance is an increase in density. The BZA has within its discretion to decide when such an increase is incompatible with the surrounding neighborhood, whether it be one lot per ten acres or one lot per every one acre.

The appellant contends that the BZA did not have any guidance at to the meaning of the term compatibility as it was used in the Ordinance before entering into deliberations. However, at the time of the Far Away Farms decision, the BZA could refer to the decision of the United States Fourth Circuit Court of Appeals opinion in Henry v. Jefferson County Planning Commission, 215 F.3d 1318 (2000), which is the only Court to address the compatibility

standard contained in the Jefferson County Zoning and Land Development Ordinance. The Fourth Circuit held that there is not doubt as the definition of compatibility which should be given the plain and ordinary meaning. *See* Henry v. Jefferson County Planning Commission, 215 F.3d 1318.

> Critically, the language and structure if the Zoning Ordinance leaves no doubt that the granting of a conditional use permit turns upon whether the proposed development at issue is compatible with the areas adjacent to the property at issue and to the nature of the of the zoned district involved. Logically the word "compatible," as used in the Zoning Ordinance, has only one meaning: 'capable of existing or living together in harmony.' *quoting The Random House Dictionary of the English Language 417 (1998).*
>
> Henry v. Jefferson County Planning Commission, 215 F.3d 1318 at 5

The Court then applied this definition of compatibility to the development that was proposed in Mr. Henry's Conditional Use Permit application, which was a high density subdivision similar to the one proposed by Far Away Farm in the case, *sub judice*. The court ruled that"[t]hese statements give a reasonable person notice and warning that a proposed development such as Henry's, which he does not dispute is a high-density residential development, would not be harmony with, and is thus not compatible with, the nature of the Rural-agriculture district." *Id.* at 6. Thus, the Fourth Circuit held that density is a component of compatibility when it determined that a "***high density***" subdivision was not compatible with the rural zone. Further, Paul Raco, the Zoning Administrator at the time, reminded the BZA of this opinion before the BZA entered into their deliberations on Far Away Farm.

> MR. RACO: I mean I can just tell you what the federal court's case stated in "Henry v. The Jefferson County Planning Commission.". . .the federal court ruled that compatibility changes with the neighborhood and left it that way, because what is compatible with the public in neighborhood may not be compatible with the neighborhood or the people in the neighborhood somewhere else.

July 26, 2005 BZA Transcript 29:8-18.

Therefore, the BZA did have guidance as to the meaning of compatibility when it rendered a decision on the Far Away Farm CUP. Accordingly, the BZA followed that direction provided in the Fourth Circuit opinion and determined that density was a component to be considered when determining the compatibility of a proposed use.

Further, as the Fourth Circuit determined, the definition of compatibility is instructive as to the standard to be applied by the BZA. Webster's dictionary defines compatible as "1) capable of existing together in harmony, 2) able to exist together with something else, 3) consistent; congruous." Webster's Encyclopedic Unabridged Dictionary of the English Language, © 1989. Under the plain meaning of compatible, comparing density to density is a reasonable interpretation to determine if the proposed subdivision is "consistent" with the surrounding neighborhood. Here, the BZA concluded that because the proposed development was much more dense than the neighborhood surrounding, it would not be compatible with the existing rural nature of the community.

Further, the Ordinance, as amended on April 8, 2005, itself is instructive on the definition of compatibility. Section 7.6(b)[5] of the Ordinance contains several criteria that may be raised at a Compatibility Assessment Meeting. Although Far Away Farm applied for a CUP under the old Ordinance before it was amended by the County Commission on April 8, 2005, the Far Away Farm CUP was the first considered by the BZA under the newly amended ordinance. It should

[5] Section 7.6(b) provides in its entirety: During the Compatibility Assessment Meeting, those who participate shall address, but are not limited to, the following criteria to determine compatibility of the proposed project: (1) Adopted federal, state and local regulations; (2) Similarity of proposed development type (residential, commercial, industrial, agricultural, etc.) to existing development types; (3) In a residential project, similarity of the density of the proposed development to existing density in the neighborhood; (4) adequacy of roads and highways to accommodate traffic to be generated by the development, with particular attention to dangerous intersections designated by the State Roads Commission or the State Police; (5) Present and future transportation patterns in the area; (6) Consistency with land use plans and regulations of incorporated municipalities immediately adjacent to the proposed development; (7) Any variance which is known to be required at the time of submittal; (8) The relationship of the proposed change to the adopted Comprehensive Plan; and (9) All items submitted with the application.

be noted that Petitioner cited to the newly amended Ordinance in the Circuit Court, and therefore, it appears that neither party disputes that the amended ordinance controls. Therefore, it is further appropriate to consider any guidance the amendments may contain in coming to a correct interpretation of those standards that are to be applied. The similarity of the proposed development type is one factor to be considered. However, the third factor in Section 7.6(b) expressly defines density as a criteria to be considered when determining the compatibility of a proposed project. Specifically, Section 7.6(b)(3) provides, "[i]n a residential project, similarity of the density of the proposed development to the existing density in the neighborhood." Therefore, the BZA can and should compare the density of the proposed project with the density of the surrounding neighborhood.

However, the Compatibility Assessment Meeting permits "the adjacent and confronting property owners" the opportunity to hear the developer's proposal. Ordinance § 7.6 (a). Thus, with regard to compatibility, neighborhood, at the very least, encompasses any adjacent or confronting property.

E. The BZA Followed the Ordinance and Its Own Rules of Procedure, Providing Far Away Farm with Adequate Procedural Due Process

The BZA allotted Far Away Farm a total of forty-five minutes to make its presentation in accordance with the time limits provided in the Ordinance and the Rules of Procedure for the Ordinance. Section 7.7(b) provides:

> All public hearings shall have time limits allotted to those who speak, as follows: the developer or his agent, or applicant shall have 30 minutes for his presentation, each group who speaks may have 15 minutes, each individual who speaks is allotted 5 minutes, the developer or his agent, or applicant are allowed 15 minutes for rebuttal.

The BZA adhered to these time frames provided in the Ordinance meaning that Far Away Farm had advance, adequate notice as to what procedure would be followed and what amount of time

it would have to present its case. In addition, any time in which a BZA member was questioning a presenter or when a presenter was answering questions posed by the BZA was not counted toward the time allotted to present to the BZA. In fact, Mr. Trumble mentioned this to the Mr. Dyck, one of the presenters for Far Away Farm.

> "Mr. Dyck: Because of time constraints, I am trying to go as quickly as I can. Mr Trumble: Mr. Dyck, just so you know, when I am asking you questions, that's going to be added to you. I am not trying to delay you here. . . That will be given to you. Okay?"
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> Transcript July 26, 2005 92:12-18

As a result of this rule, the BZA hearing on July 26, 2005 lasted for almost five hours, commencing at 9:09 a.m. and concluding at 12:52 p.m. In addition to this time, the BZA adjourned another special meeting on August 9, 2005 at 9:17 a.m. to further deliberate the project. This meeting lasted for an hour, concluding at 10:18 a.m. Thus, the BZA devoted almost six hours to the Far Away Farm CUP in addition to each individual member's review of the written submissions.

Far Away Farm had the opportunity to submit unlimited written evidence to the BZA, and took advantage of this opportunity, when it provided the BZA with a thirty page memorandum and more than 320 pages of expert witness opinions and reports. Thus, what the developer could not present in the time it was allotted at the public hearing, it presented through written materials in accordance with the ordinance.

The BZA Rules of Procedure grant the Board discretion to limit cross examination. Rule of Procedure § 6(j) provides "[c]ross examination by a party is permitted as necessary for a full disclosure of the facts. The Board has discretion to limit cross-examination."

The failure to provide cross-examination at a land use hearing does not violate the petitioner's due process rights. In Williams v. City of Columbia, 906 F.2d 994 (4th Cir. S.C.

1990) the Fourth Circuit ruled that cross-examination is not necessary to provide adequate due process. In Williams, the petitioner argued that his due process rights were violated when he was denied the opportunity to cross examine witnesses at a hearing before a the City of Columbia's Zoning Board of Adjustment (ZBA). However, the Court ruled that it was "unconvinced that the ZBA proceedings, where Williams was represented by counsel and permitted to present extensive evidence, were either inadequate or violative of due process." *Id.* at 996. Other courts have also found that cross-examination in land-use proceedings is not essential to provide adequate due process. The Tenth Circuit, in Landmark Land Company of Oklahoma, Inc v. Buchanan, 874 F.2d 717 (10th Cir. 1989) where the petitioner challenged the city's failure to provide cross-examination, found that "[i]n land use proceedings , parties are simply not entitled to anything like a judicial hearing with all its adversarial trappings." 874 F.2d 724. The First Circuit has also ruled that cross-examination is not necessary to provide adequate due process in land use proceedings. "A zoning or quasi-zoning question does not constitutionally require anything like a judicial hearing." Chongris v. Board of Appeals of the Town of Andover, 811 F.2d 36, 41 (1st Cir. 1987). "So omitting cross-examination at a zoning hearing or kindred event does not amount to a denial of due process in violation of the fourteenth amendment." *Id.* at 42. Therefore, the BZA's failure to provide cross-examination is not a fatal flaw to Far Away Farm's procedural due process rights.

Finally, although the Petitioner received adequate due process, it is not entitled to any due process protections because Far Away Farm does not have a vested or legitimate property interest in the CUP process. Article III, Section 10 of the West Virginia Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law..." Therefore, the procedural due process is only triggered by the existence of a liberty or property

interest. State Deputy Sheriff's Association v. County Commission of Lewis County,180 W.Va. 420, 422, 376 S.E.2d 626, 628. "No property interest exists where an individual does not have a legitimate claim of entitlement to the object sought." *Syl. Pt. 3*, State Deputy Sheriff's Association, 180 W.Va. 420, 376 S.E.2d 626.

Far Away Farm does not have a legitimate claim of entitlement to a CUP. "A person has a legitimate claim of entitlement to a development plan if the individuals reviewing the plan lack all discretion to deny the issuance of the permit or withhold its approval. Any significant discretion conferred upon the individuals reviewing the plan defeats the claim of a property interest." Henry v. Jefferson County Planning Commission, 148 F. Supp.2d 698, 711 *aff'd in part, vacated in part* 34 Fed. Appx. 92 (4th Cir. W.Va.2002), *cert. denied,* (U.S. Mar. 31, 2003), *quoting* Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701. The issuance of a CUP to increase density in the rural zone is not a right to which Far Away Farm is entitled but rather the issuance of the CUP is contingent upon the discretion of the BZA, which body is guided by the factors delineated in the Zoning Ordinance. An applicant's interest in obtaining a conditional use permit under the Jefferson County CUP Process is "at best, a unilateral expectation, and not a protected property interest." Henry, *supra.* at 714. Therefore, Far Away Farm is not entitled to procedural due process protection in the CUP process, which is only triggered by the existence of a property interest which would vest upon the issuance of a CUP.

F. The BZA Did Not Apply a Different Standard in the Town Run Commons CUP

The BZA did not use the median lot size as a measure for the Town Run Commons CUP, and the Petitioner cannot cite to any passage in the Order Granting the Conditional Use Permit that would indicate a different standard was there. Further, density is not the only factor the BZA

considers when it decides to grant or deny a CUP. Accordingly, each subdivision is judged on its own merits and nowhere in Ordinance or other land use law is the BZA required to grant a CUP because other applicants in the same area received a CUP for an increase in density. Further, Town Run Commons CUP was an application that contained facts meriting the granting of a conditional use permit. For example, the property had historically contained a non-conforming use. In addition the application mirrored the historic down town Shepherdstown area. Finally, the developer promised to devote at least one third of the housing to affordable housing, a scare commodity throughout Jefferson County. Thus, Town Run Commons possessed unique factors that distinguish it from Far Away Farms. However, there is no indication that a different measurement was used or that density is the only standard the BZA applies when evaluating a CUP.

Further, the applicant's assertion that because other subdivisions received CUPs, Far Away Farm is also entitled to a CUP, highlights the fallacy of the Petitioner's arguments concerning density and compatibility. Under the Petitioner's rationale, if one high density subdivision exists in the rural zone, then other high density subdivision must also be approved. However, such a rationale annihilates the rural zone, for if one high density subdivision is approved in an area than other applicants can simply use that approval as justification that their CUP must also be approved, thereby destroying the low density character of the rural zone. The Ordinance explicitly states that "[t]he purpose of this district is to provide a location for low density single family residential development. . ." *Jefferson County Zoning Ordinance* §5.7. If the BZA is compelled to approve every CUP where another CUP has also been approved in the same area, then the rural district would cease to exist. Thus, the BZA is permitted to deny or limit the density of CUPs to maintain the rural zone.

VI. Relief Requested

WHEREFORE, for the foregoing reasons, the Respondent, the Jefferson County Board of Zoning Appeals requests that this Court deny the relief sought in this appeal, and that this Honorable Court uphold the Order of the Circuit Court.

Respectfully Submitted,
Jefferson County Board of Zoning Appeals
By Counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAR AWAY FARM, LLC
Petitioners,

v. **Supreme Court Docket No. 33438**

JEFFERSON COUNTY
BOARD OF ZONING APPEALS,
TIFFANY HINE, Chair
THOMAS TRUMBLE, member
JEFF BRESEE, member
Respondent.

CERTIFICATE OF SERVICE

I, Stephanie F. Grove, do hereby certify that on this 21st day of August 2007, I served a true copy of the foregoing JEFFERSON COUNTY BOARD OF ZONING APPEALS RESPONSE TO BREIF ON APPEAL upon the following counsel by first class United States Mail addressed as follows:

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